

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHELDEN GREENBERG, Individually and)
On Behalf of All Others Similarly Situated,)

Plaintiff,)

vs.)

THE BEAR STEARNS COMPANIES INC.,)
JAMES E. CAYNE; ALAN C. GREENBERG;)
JEFFREY MAYER; SAMUEL L.)
MOLINARO, JR.; ALAN D. SCHWARTZ;)
WARREN J. SPECTOR; and JOHN AND)
JANE DOES 1-10,)

Defendants.)

Case No. 08-CV-3334 (RWS)

CLASS ACTION

[additional captions follow]

**PLAINTIFFS AARON HOWARD AND SHELDEN GREENBERG'S
REPLY TO PLAINTIFF DREW V. LOUNSBURYS' RESPONSE TO THE MOTIONS
OF *WEBER* AND *HOWARD* PLAINTIFFS FOR CONSOLIDATION OF ALL
RELATED ERISA CASES AND OTHER RELIEF**

AARON HOWARD, Individually and On
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

THE BEAR STEARNS COMPANIES INC.,
THE BEAR STEARNS COMPANIES INC.
EXECUTIVE COMMITTEE, JAMES E.
CAYNE; ALAN D. SCHWARTZ; WARREN
J. SPECTOR; SAMUEL L. MOLINARO, JR.;
ALAN C. GREENBERG; and JOHN AND
JANE DOES 1-10,

Defendants.

Case No. 08-CV-2804 (RWS)

CLASS ACTION

ESTELLE WEBER, Individually and On
Behalf of the Bear Stearns Companies Inc.
Employee Stock Ownership Plan, and All
Others Similarly Situated,

Plaintiff,

vs.

THE BEAR STEARNS COMPANIES INC.
CUSTODIAL TRUST COMPANY, JAMES E.
CAYNE; ALAN D. SCHWARTZ; WARREN
J. SPECTOR; SAMUEL L. MOLINARO, JR.;
ALAN C. GREENBERG; and JOHN AND
JANE DOES 1-10,

Defendants.

Case No. 08-CV-2870 (RWS)

CLASS ACTION

ANTHONY PISANO, Individually and On
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

THE BEAR STEARNS COMPANIES INC.,
JAMES E. CAYNE; ALAN D. SCHWARTZ;
WARREN J. SPECTOR; SAMUEL L.
MOLINARO, JR.; ALAN C. GREENBERG;
and JOHN AND JANE DOES 1-10,

Defendants.

Case No. 08-CV-3006 (UA)

CLASS ACTION

IRA GEWIRTZ, Individually and On Behalf of
All Others Similarly Situated,

Plaintiff,

vs.

THE BEAR STEARNS COMPANIES INC.,
JAMES E. CAYNE; ALAN D. SCHWARTZ;
WARREN J. SPECTOR; SAMUEL L.
MOLINARO, JR.; ALAN C. GREENBERG;
and JOHN AND JANE DOES 1-10,

Defendants.

Case No. 08-CV-3089 (RWS)

CLASS ACTION

HANS MENOS, Individually and on Behalf of
All others Similarly Situated,

Plaintiff,

vs.

THE BEAR STEARNS COMPANIES INC.,
JAMES E. CAYNE; ALAN D. SCHWARTZ;
WARREN J. SPECTOR; SAMUEL L.
MOLINARO, JR.; ALAN C. GREENBERG;
and JOHN AND JANE DOES 1-10,

Defendants.

Case No. 08-CV-3035 (RWS)

CLASS ACTION

DREW V. LOUNSBURY, Individually and On)
Behalf of All Others Similarly Situated,)

Plaintiff,)

vs.)

THE BEAR STEARNS COMPANIES INC.)
JAMES E. CAYNE; ALAN C. GREENBERG;)
ALAN D. SCHWARTZ; PAUL A.)
NOVELLY; FRANK T. NICKELL;)
FREDERIC V. SALERNO; VINCENT TESE;)
and JOHN AND JANE DOES 1-10,)

Defendants.)

Case No. 08-CV-3326 (RWS)

SCOTT WETTERSTEN, individually and on)
behalf of all others similarly situated,)

Plaintiff,)

vs.)

THE BEAR STEARNS COMPANIES INC.,)
JAMES E. CAYNE, ALAN D. SCHWARTZ,)
WARREN J. SPECTOR, SAMUEL L.)
MOLINARO, ALAN C. GREENBERG, and)
JOHN AND JANE DOES 1-10,)

Defendants.)

Case No. 08-CV-3351 (RWS)

RITA RUSIN, individually and on behalf of all)
others similarly situated,)

Plaintiff,)

v.)

THE BEAR STEARNS COMPANIES, INC.,)
JAMES E. CAYNE, ALAN D. SCHWARTZ,)
WARREN J. SPECTOR, SAMUEL L.)
MOLINARO, JR., ALAN C. GREENBERG,)
and JOHN AND JANE DOES 1-20,)

Defendants.)

Case No. 08-CV-3441 (RWS)

LAWRENCE FINK, individually and on behalf)
of all other similarly situated,)

Plaintiff,)

v.)

THE BEAR STEARNS COMPANIES, INC.,)
JAMES E. CAYNE, ALAN D. SCHWARTZ,)
WARREN J. SPECTOR, SAMUEL L.)
MOLINARO, JR., ALAN C. GREENBERG,)
and JOHN AND JANE DOES 1-20,)

Defendants.)

Case No. 08-CV-3602 (UA)

Plaintiffs Aaron Howard and Sheldon Greenberg (the “*Howard* Plaintiffs”) respectfully submit this Reply to Plaintiff Drew V. Lounsbury’s (“Lounsbury’s”) Response to the Motions of *Weber* and *Howard* Plaintiffs for Consolidation of all Related ERISA Cases and Other Relief.¹

PRELIMINARY STATEMENT

As the prior submissions of Keller Rohrback L.L.P. (“Keller Rohrback”) and Schiffrin Barroway Topaz & Kessler, LLP (“SBTK”) establish, Keller Rohrback and SBTK have unmatched experience and expertise in ERISA class action company stock cases of this type.² Indeed, counsel for Plaintiff Lounsbury cannot genuinely contend that it possesses the same level of experience or expertise in this complex area of law. Moreover, the arguments raised by counsel for Plaintiff Lounsbury against the appointment of the *Howard* Plaintiffs and their counsel as Lead Plaintiffs and Co-Lead Counsel, respectively, are without merit.

First, that Plaintiff Lounsbury may not have signed a release of his claims is of no moment because individuals lack the authority to release a defined contribution plan’s right to recover for breaches of fiduciary duty. *Second*, the fact that the *Howard* Plaintiffs’ counsel are located outside of New York is irrelevant -- both Keller Rohrback and SBTK have been appointed lead or co-lead counsel in numerous, nationally prominent ERISA class action cases pending before this Court. *Third*, the *Howard* Plaintiffs’ decision not to name Bear Stearns’

¹ See Response of Plaintiff Drew V. Lounsbury to the Motions of the *Weber* Plaintiffs and the *Howard* Plaintiffs for Consolidation of Related ERISA Cases and Other Relief (“*Lounsbury* Response”) filed by Stull, Stull & Brody (“SS&B”) and Kantrowitz Goldhamer & Graifman, P.C. filed on April 10, 2008.

² See Memorandum of Law in Support of Plaintiffs Aaron Howard and Sheldon Greenberg’s Motion to: Consolidate ERISA Actions; Appoint Interim Lead Plaintiffs, Interim Co-Lead Counsel and Interim Liaison Counsel; and for Entry of Pretrial Order No. 1 (“*Howard* Plaintiffs’ Brief”), filed on April 7, 2008, and Memorandum in Partial Opposition to the *Weber* Plaintiffs’ Motion for (1) Consolidation (2) Appointment of Lead Plaintiffs and Leadership Structure and (3) Entry of [Proposed] Pretrial Order No. 1 (“*Howard* Plaintiffs’ Opposition”), filed on April 15, 2008.

Finance and Risks Committees as defendants is wholly appropriate given the dearth of evidence to date indicating that they are Plan fiduciaries. Accordingly, the *Howard* Plaintiffs respectfully submit that their motion for appointment of themselves as Lead Plaintiff and Keller Rohrback and SBTk as Interim Co-Lead Counsel should be granted.

ARGUMENT

A. The Four Factors of Rule 23(g) Support Appointment of Keller Rohrback and SBTk as Interim Co-lead Counsel.

The question before the Court is which of the proposed leadership structures will best represent the interests of the putative Class. As noted in the *Howard* Plaintiffs' prior submissions, four factors predominate:

- the work counsel has done in identifying or investigating potential claims in the action;
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;
- counsel's knowledge of the applicable law; and
- the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(C)(i).

These four factors and the record before the Court support appointment of the *Howard* Plaintiffs as Interim Lead Plaintiffs and their attorneys, Keller Rohrback and SBTk, as Interim Co-Lead Counsel.

1. Keller Rohrback & SBTk Have the Most Comprehensive ERISA Experience and Expertise to Offer the Class.

As the *Howard* Plaintiffs previously set forth in detail, each of the four factors delineated in Rule 23(g) supports appointment of Keller Rohrback and SBTk as Interim Co-Lead Counsel in this case.³

Federal Rule 23(g)(2)(B) states: “If more than one adequate applicant seeks appointment as counsel, the court must appoint the applicant best able to represent the interests of the class.” The conventional wisdom that experience is the most important factor when selecting lead counsel applies with particular force in a complex case of this sort in which the law is rapidly developing. *See, e.g., Nowak v. Ford Motor Co.*, 240 F.R.D. 355, 361 (E.D. Mich. 2006) (appointing Keller Rohrback and SBTk as co-lead counsel); *In re Terzaosin Hydrochloride*, 220 F.R.D. 672, 702 (S.D. Fla. 2004) (the “most persuasive” factor in choosing lead counsel pursuant to Rule 23(g) may be proposed counsel’s “experience in, and knowledge of, the applicable law in this field”) (cited in *Nowak*, 240 F.R.D. at 361).⁴

As set forth at length in the *Howard* Plaintiffs’ motion papers, Keller Rohrback and SBTk have significantly more experience in ERISA company stock litigation than any other firm seeking a leadership role, and have devoted substantial resources and time to developing unparalleled expertise in this area of law. Indeed, both Keller Rohrback and SBTk are recognized nationally for the results they have achieved in litigating cases of this same type.

³ *See Howard* Plaintiffs’ Brief and *Howard* Plaintiffs’ Opposition.

⁴ Indeed, many courts have recognized that this is a highly complex and rapidly developing area of law. *See, e.g., In re Global Crossing, Ltd. Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (finding that “[f]iduciary status, the scope of fiduciary responsibility, the appropriate fiduciary response to the Plans’ concentration in company stock and [Global Crossing’s] business practices would be issues for proof, and numerous legal issues concerning fiduciary liability in connection with company stock in 401(k) plans remain unresolved”).

2. Counsel for Plaintiff Lounsbury Cannot Match the ERISA Qualifications of Keller Rohrbach and SBTK.

The Lounsbury Plaintiffs' counsel, Stull, Stull & Brody ("SS&B") cite to a handful of ERISA breach of fiduciary duty cases in which it acted in a leadership capacity with other firms. Notably, however, it does not and cannot claim that its experience level approaches the combined experience of Keller Rohrbach and SBTK. For example, Keller Rohrbach has achieved settlements in excess of **\$750 million** on behalf of employees and retirees in analogous ERISA cases (*Howard* Plaintiffs' Opposition at 3). Additionally, SS&B does not claim any role in the development of this practice area (*Cf. Howard* Plaintiffs' Opposition at 8, explaining that Keller Rohrbach and SBTK have "pioneered and obtained ground-breaking opinions in the area of ERISA class action company stock cases"). Nor is SS&B as widely recognized for its expertise in ERISA class action cases as counsel for the *Howard* Plaintiffs (*Cf. Howard* Plaintiffs' Opposition at 8 & n.7, explaining that Lynn L. Sarko and Derek W. Loeser of Keller Rohrbach frequently appear as faculty at national CLEs and other training programs addressing ERISA breach of fiduciary duty class actions).

Indeed, Keller Rohrbach and SBTK have devoted years to this practice area, and through that process have honed the skill set and deep understanding of ERISA law needed to litigate cases of this type efficiently and effectively. While counsel for the *Howard* Plaintiffs acknowledge that the attorneys at SS&B are good lawyers, their experience and expertise simply does not match the *Howard* Plaintiffs' knowledge of ERISA and track record of success in this precise type of case. This knowledge and expertise ensures that Keller Rohrbach and SBTK will be best able to represent the interests of the class, as mandated by the selection criteria under Fed. R. Civ. P. 23(g)(2)(B).

B. Lounsbury's Release, Location, And Pleadings Arguments Lack Merit.

Plaintiff Lounsbury argues that he should be appointed Lead Plaintiff because he did not sign a release of claims. However, Keller Rohrback and SBTk have litigated and prevailed on this precise issue – the validity of releases in ERISA company stock litigation – in this very district. As Judge Pauley held in *Polaroid*, since a claim under ERISA § 502(a)(2) is on behalf of a plan, “individuals do not have the authority to release a defined contribution plan’s right to recover for breaches of fiduciary duty.” *Polaroid ERISA Litig.*, 240 F.R.D. 65, 75 (S.D.N.Y. 2006) (listing cases holding same). Additionally, to the extent releases need to be addressed at all in ERISA company stock litigation, they should be dealt with on a class-wide basis. *Id.* at 76 (rejecting argument that releases signed by certain class members defeated typicality requirement in motion for class certification). Accordingly, the fact that Plaintiff Lounsbury did not (to the best of his recollection) sign a release provides no evidence that SS&B would be better able to lead this litigation than Keller Rohrback and SBTk.

Plaintiff Lounsbury also argues that SS&B should be appointed lead counsel because Keller Rohrback and SBTk are both located outside of the Southern District of New York. This argument is belied by the fact that both Keller Rohrback and SBTk have, on numerous occasions, been appointed lead or co-lead counsel in multiple, nationally prominent ERISA class action cases pending before this Court. *See Howard* Plaintiffs’ Opposition at 3 noting that Keller Rohrback has served in a leadership position in the following cases in the Southern District of New York: *In re WorldCom, Inc. ERISA Litigation*, No. 02-4816 (S.D.N.Y.) (J. Cote); *In re Global Crossing ERISA Litigation*, No. 02-7453 (S.D.N.Y.) (J. Lynch); *In re Polaroid ERISA Litigation*, No. 03-8335 (S.D.N.Y.) (J. Pauley); *In re Marsh ERISA Litigation*, No. 04-8157 (S.D.N.Y.) (J. Kram); *In re Pfizer Inc. ERISA Litig.*, No. 04-10071 (S.D.N.Y.) (J. Owen); *In re AIG ERISA Litig.*, No. 04-8141 (S.D.N.Y.) (J. Sprizzo); and *In re Merrill Lynch & Co., Inc. Sec.*,

Derivative & ERISA Litig., No. 07-9633 (S.D.N.Y.) (J. Sand); and noting that SBTk has served in a leadership position in the following cases in the Southern District of New York: *In re AOL ERISA Litig.*, 02-CV-8853 (S.D.N.Y.); *In re Citigroup Litig.*, No. 03-CV-2932 (S.D.N.Y.); *In re Global Crossing ERISA Litig.*, No. 02-7453 (S.D.N.Y.); *In re Bristol-Myers Squibb Co. ERISA Litig.*, No. 02-CV-10129 (S.D.N.Y.); *Koch v. Loral Space Commc'ns Ltd.*, 03-CV-9729 (S.D.N.Y.); *In re Polaroid ERISA Litigation*, No. 03-8335 (S.D.N.Y.); and *Wilson v. Federal Home Loan Mortgage Corp.*, No. 04-CV-2632 (S.D.N.Y.). As these many appointments demonstrate, Keller Rohrback's and SBTk's location outside of New York has no impact on the fact that they are the most qualified to serve the best interests of the class.

Finally, Plaintiff Lounsbury argues that SS&B should be appointed interim lead counsel over Keller Rohrback and SBTk because the *Howard* Plaintiffs' complaints do not name members of Bear Stearns' Finance and Risks Committee as defendants. However, the *Howard* Plaintiffs' review of available Plan documents to date fails to indicate this Committee, or its members, had any fiduciary responsibility regarding the Plan. In the event that further discovery reveals that certain of this committee's members were *de facto* fiduciaries, the *Howard* Plaintiffs will amend the Complaint accordingly. This eminently reasonable approach is wholly appropriate in cases of this type, as it promotes judicial efficiency and economy by preventing unnecessary parties, with no responsibility for the Plan or its assets, from being brought needlessly into litigation. Accordingly, the *Howard* Plaintiffs' decision not to name Finance and Risks Committee members as Defendants at this juncture is of no moment.

CONCLUSION

For the foregoing reasons, and for those discussed at length in their previous submissions, the *Howard* Plaintiffs respectfully request that the Court grant their Motion for Consolidation of

Related Actions and for Appointment of Interim Lead Plaintiffs and Interim Co-Lead and Liaison Counsel.

Dated: April 21, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date that a true and correct copy of the foregoing Plaintiffs Aaron Howard and Sheldon Greenberg's Reply to Plaintiff Drew V. Lounsbury's Response to the Motions of Weber Plaintiffs and the Howard Plaintiffs for Consolidation of all Related ERISA Cases and Other Relief was served on the following via the Court's ECF filing system.

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/s/

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